

**Timothy J. Hogan**

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**From:** Timothy J. Hogan  
**Sent:** Tuesday, July 19, 2005 11:33 AM  
**To:** 'Damian Capozzola'; Clyde Matsui (cmatsui@triallawhawaii.com); K Akamine  
**Cc:** ael@ksglaw.com; cmatsui@triallawhawaii.com; Eric Liebler; Emily Reber Porter (E-mail); Rex Fujichaku; gtom@wik.com; John T. Komeiji; K Akamine; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; rpbm@Hosodalaw.Com; Roy Tjioe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)  
**Subject:** RE: Letter to Discovery Master

Tracking: Recipient	Read
'Damian Capozzola'	
Clyde Matsui (cmatsui@triallawhawaii.com)	
K Akamine	
ael@ksglaw.com	
cmatsui@triallawhawaii.com	
Eric Liebler	
Emily Reber Porter (E-mail)	
Rex Fujichaku	
gtom@wik.com	
John T. Komeiji	
K Akamine	
kgabler	
Sheldon Toll (E-mail)	
Lex Smith	
Lyle Hosoda	
Lyle Hosoda	
Margery Bronster (E-mail)	
Olivia Samad	
Rex Y. Fujichaku	
rpbm@Hosodalaw.Com	
Roy Tjioe (E-mail)	
Victor Limongelli (E-mail)	
Wesley H. Ching (E-mail)	
'Wayne Berry'	
Wesley W. Ichida	Read: 7/20/2005 9:37 AM

Dear Mr. Capozzola:



So we don't get delayed in another claim of inadvertent disclosure of privileged materials please see: United States Fid. & Guaranty Co. v. Braspetro Oil Servs. Co., 2002 U.S. Dist. LEXIS 111, 53 Fed. R. Serv. 3d (Callaghan) 60 (S.D.N.Y. Jan. 4, 2002). This case involved a similar discovery dispute in which Defendant alleged that attorney-client privilege applied to 60 electronic discs that had been supplied to defendant's experts. Plaintiffs asserted that supplying the discs to the experts had ceased any level of confidentiality and the court agreed and ordered the defendant to produce all information that had been provided to their experts. In this case, the waiver was clear because the expert "could" open the files. It didn't matter "if" the expert actually opened them.

**EXHIBIT "D"**

In addition, you have claimed privilege over the database and Crystal reports files as part of the privileged files. You refuse to produce a log and are using this claim of privilege to stymie Mr. Berry from being able to present his case and to ferret out the fraud.

Your intentional waiver is complete and irrevocable. Because you have waived a substantive right of the Debtors and the committee, do you think this issue should be run past Judge Walrath for her say on the waiver? See also CP Kelco United States, Inc. v. Pharmacia Corp., 213 F.R.D. 176, 178 (D. Del., 2003) (Delaware District Court finding all materials provided to trial expert must be produced because privilege is irrevocably waived).

Tim Hogan

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Timothy J. Hogan  
Lynch Ichida Thompson Kim & Hirota  
1132 Bishop Street, Suite 1405  
Honolulu, Hawaii 96813  
Tel. (808) 528-0100  
Fax. (808) 528-4997  
Email [tjh@loio.com](mailto:tjh@loio.com)

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**From:** Damian Capozzola [<mailto:dcazzola@kirkland.com>]  
**Sent:** Tuesday, July 19, 2005 10:50 AM  
**To:** Timothy J. Hogan  
**Cc:** [ael@kslaw.com](mailto:ael@kslaw.com); [cmatsui@triallawhawaii.com](mailto:cmatsui@triallawhawaii.com); Eric Liebler; Emily Reber Porter (E-mail); Rex Fujichaku; [gtom@wik.com](mailto:gtom@wik.com); John T. Komeiji; K Akamine; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; [rpbm@Hosodalaw.Com](mailto:rpbm@Hosodalaw.Com); Roy Tjioe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)  
**Subject:** RE: Letter to Discovery Master

Mr. Hogan,

I believe you are mistaken. We specifically instructed Dr. Walker to disregard any attorney-client materials and focus exclusively on the technical issues relevant to his analysis, and if and when you depose Dr. Walker you will be free to explore this issue. But under the present circumstances we do not believe there has been a waiver of any sort; I invite you to make whatever motion you feel you need to make if you continue to disagree.

Thank you for your attention to these matters.

—Damian

**Damian D. Capozzola | KIRKLAND & ELLIS LLP**  
 777 South Figueroa St., Floor 37 | Los Angeles, CA 90017  
 213.680.8653 PHONE | 213.448.2709 MOBILE | 213.680.8500 FACSIMILE

dcapozzola@kirkland.com | www.kirkland.com/dcapozzola

"Timothy J. Hogan" <tjh@loio.com>

07/19/2005 01:41 PM

To "Damian Capozzola" <dcapozzola@kirkland.com>,  
 <cmatsui@triallawhawaii.com>, "K Akamine" <kakamine@triallawhawaii.com>  
 <ael@ksqlaw.com>, "Eric Liebeler" <eliebeler@kirkland.com>, "Emily Reber  
 Porter (E-mail)" <eporter@goodsill.com>, "Rex Fujichaku"  
 <fujichaku@hotmail.com>, <gtom@wik.com>, "John T. Komeiji"  
 <JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll (E-  
 mail)" <lawtoll@comcast.net>, "Lex Smith" <lex@gte.net>, "Lyle Hosoda"  
 <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery  
 Bronster (E-mail)" <mbronster@bchlawnet>, "Olivia Samad"  
 <OSamad@kirkland.com>, "Rex Y. Fujichaku" <rfujichaku@bchlawnet>,  
 <rpbm@Hosodalaw.Com>, "Roy Tjioe (E-mail)" <rtjioe@goodsill.com>,  
 "Victor Limongelli (E-mail)" <victor.limongelli@guidancesoftware.com>,  
 "Wesley H. Ching (E-mail)" <WHC@fmhc-law.com>

Subject RE: Letter to Discovery Master

Dear Mr. Capozzola:

We have no objection to the materials being provided to Mr. Walker under the terms of the protective order.

→ We need to make clear, because the PCT knowingly and voluntarily "shipped" them to its trial expert it can't withhold them from Mr. Berry on the grounds of privilege. It is clear that the PCT has voluntarily waived attorney-client privilege over these materials and their subject matter. I respectfully ask that Master please return our After DVD and request a date certain when we can receive a full copy of the Hard Drive and other materials identified in Mr. Limongelli's letter and shipped to Dr. Walker. We will purchase our drive and await your instructions.

Thank you for your prompt attention to this so we can move forward without delay,

Tim Hogan

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Timothy J. Hogan  
 Lynch Ichida Thompson Kim & Hirota  
 1132 Bishop Street, Suite 1405  
 Honolulu, Hawaii 96813  
 Tel. (808) 528-0100  
 Fax. (808) 528-4997  
 Email tjh@loio.com

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sender at [tjh@loio.com](mailto:tjh@loio.com) or at (808) 528-0100.

**From:** Damian Capozzola [<mailto:dcapozzola@kirkland.com>]

**Sent:** Tuesday, July 19, 2005 9:53 AM

**To:** Timothy J. Hogan

**Cc:** [ael@kslaw.com](mailto:ael@kslaw.com); Eric Liebler; Emily Reber Porter (E-mail); Rex Fujichaku; [gtom@wik.com](mailto:gtom@wik.com); John T. Komeiji; [kgabler@nchc.com](mailto:kgabler@nchc.com); Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; [rpbm@hosodalaw.com](mailto:rpbm@hosodalaw.com); Roy Tjioe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)

**Subject:** RE: Letter to Discovery Master

The letter and the materials it describes.

**Damian D. Capozzola | KIRKLAND & ELLIS LLP**  
777 South Figueroa St., Floor 37 | Los Angeles, CA 90017  
213.680.8653 PHONE | 213.448.2709 MOBILE | 213.680.8500 FACSIMILE

[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com) | [www.kirkland.com/dcapozzola](http://www.kirkland.com/dcapozzola)

"Timothy J.  
Hogan"  
[tjh@loio.com](mailto:tjh@loio.com)

07/19/2005 12:45  
PM

To "Damian Capozzola" <[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)>, <[ael@kslaw.com](mailto:ael@kslaw.com)>, "Eric Liebler" <[eliebeler@kirkland.com](mailto:eliebeler@kirkland.com)>, "Emily Reber Porter (E-mail)" <[eporter@goodsill.com](mailto:eporter@goodsill.com)>, "Rex Fujichaku" <[fujichaku@hotmail.com](mailto:fujichaku@hotmail.com)>, "John T. Komeiji" <[JKomeiji@wik.com](mailto:JKomeiji@wik.com)>, "kgabler" <[kgabler@nchc.com](mailto:kgabler@nchc.com)>, "Sheldon Toll (E-mail)" <[lawtoll@comcast.net](mailto:lawtoll@comcast.net)>, "Lex Smith" <[lex@gte.net](mailto:lex@gte.net)>, "Lyle Hosoda" <[ls@hosodalaw.com](mailto:ls@hosodalaw.com)>, "Lyle Hosoda" <[ls@hosoda@hotmail.com](mailto:ls@hosoda@hotmail.com)>, "Margery Bronster (E-mail)" <[mbronster@bchlawnet.com](mailto:mbronster@bchlawnet.com)>, "Olivia Samad" <[OSamad@kirkland.com](mailto:OSamad@kirkland.com)>, "Rex Y. Fujichaku" <[rfujichaku@bchlawnet.com](mailto:rfujichaku@bchlawnet.com)>, <[rpbm@hosodalaw.com](mailto:rpbm@hosodalaw.com)>, "Roy Tjioe (E-mail)" <[rtjioe@goodsill.com](mailto:rtjioe@goodsill.com)>, "Victor Limongelli (E-mail)" <[victor.limongelli@guidancesoftware.com](mailto:victor.limongelli@guidancesoftware.com)>, "Wesley H. Ching (E-mail)" <[WHC@fmhc-law.com](mailto:WHC@fmhc-law.com)>, <[gtom@wik.com](mailto:gtom@wik.com)>

cc

Subject RE: Letter to Discovery Master

Mr. Capozzola:

Can you please describe the "materials" to which you refer? Is it just the pdf letter or is it more?

Thanks,

Tim Hogan

Timothy J. Hogan  
 Lynch Ichida Thompson Kim & Hirota  
 1132 Bishop Street, Suite 1405  
 Honolulu, Hawaii 96813  
 Tel. (808) 528-0100  
 Fax. (808) 528-4997  
 Email [tjh@loio.com](mailto:tjh@loio.com)

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**From:** Damian Capozzola [<mailto:dcapozzola@kirkland.com>]

**Sent:** Tuesday, July 19, 2005 9:42 AM

**To:** [ael@ksglaw.com](mailto:ael@ksglaw.com); Eric Liebler; Emily Reber Porter (E-mail); Rex Fujichaku; John T. Komeiji; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; [rpbm@Hosodalaw.Com](mailto:rpbm@Hosodalaw.Com); Roy Tjioe (E-mail); Timothy J. Hogan; Victor Limongelli (E-mail); Wesley H. Ching (E-mail); [dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com); [gtom@wik.com](mailto:gtom@wik.com)

**Subject:** Fw: Letter to Discovery Master

Counsel,

FYI, we have shipped these materials to Marty Walker. I presume there is and can be no objection, but out of an abundance of caution please let me know if anyone disagrees. Thank you for your attention to these matters.

—Damian Capozzola

**Damian D. Capozzola | KIRKLAND & ELLIS LLP**  
 777 South Figueroa St., Floor 37 | Los Angeles, CA 90017  
 213.680.8653 PHONE | 213.448.2709 MOBILE | 213.680.8500 FACSIMILE

[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com) | [www.kirkland.com/dcapozzola](http://www.kirkland.com/dcapozzola)

— Forwarded by Damian Capozzola/Los Angeles/Kirkland-Ellis on 07/19/2005 12:40 PM —

"Limongelli, Victor"  
[victor.limongelli@guidancesoftware.com](mailto:victor.limongelli@guidancesoftware.com)

07/18/2005 12:17 PM

<[cmatsui@triallawhawaii.com](mailto:cmatsui@triallawhawaii.com)>, "Timothy J. Hogan" <[tjh@loio.com](mailto:tjh@loio.com)>, "Damian Capozzola (E-mail)" <[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)>, "Emily Reber Porter (E-mail)" <[ereporter@goodsill.com](mailto:ereporter@goodsill.com)>, "Eric Liebler (E-mail)" <[eliebeler@kirkland.com](mailto:eliebeler@kirkland.com)>, "John T. Komeiji" <[JKomeiji@wik.com](mailto:JKomeiji@wik.com)>, <[kgabler@nchc.com](mailto:kgabler@nchc.com)>, "Leroy Colombe (E-mail)" <[lcolombe@ckdbw.com](mailto:lcolombe@ckdbw.com)>, "Lex Smith (E-mail)" <[lex@gte.net](mailto:lex@gte.net)>, "Lyle Hosoda (E-mail)" <[ls@hosodalaw.com](mailto:ls@hosodalaw.com)>, "Lyle Hosoda (E-mail)" <[ls@hosoda@hotmail.com](mailto:ls@hosoda@hotmail.com)>, "Margery Bronster (E-mail)" <[mbronster@bclaw.net](mailto:mbronster@bclaw.net)>, "Rex Fujichaku" <[fujichaku@hotmail.com](mailto:fujichaku@hotmail.com)>, "Rex Y. Fujichaku" <[rfujichaku@bclaw.net](mailto:rfujichaku@bclaw.net)>, "Roy Tjioe (E-mail)" <[rtjioe@goodsill.com](mailto:rtjioe@goodsill.com)>, "Sheldon Toll (E-mail)" <[lawtoll@comcast.net](mailto:lawtoll@comcast.net)>, "Wesley H. Ching (E-mail)" <[WHC@fmhc-law.com](mailto:WHC@fmhc-law.com)>, "K Akamine" <[kakamine@triallawhawaii.com](mailto:kakamine@triallawhawaii.com)>

cc

Subject: Letter to Discovery Master



All – Please find the attached letter to the Discovery Master dated July 18, 2005.

Victor Limongelli | General Counsel | Guidance Software, Inc.  
 215 N. Marengo Ave. | Pasadena | CA | 91101 | t 626.229.9191 | f 626.229.9199  
 victor@guidancesoftware.com | [www.guidancesoftware.com](http://www.guidancesoftware.com)

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